Supreme Court, U.S.
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OFFICE OF THE CLERK

No. :

In the

Supreme Court of the United States

ROBERT KATZ,

Plaintiff-Appellant,

-against-

MAX MANAGEMENT CORP.,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION SECOND DEPARTMENT

ROBERT A. KATZ
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QUESTIONS PRESENTED

1. Could the trial court and the appellate court ignore your petitioner's right to recover where the defendant during trial admitted all of the elements of the common law strict liability tort of *trespass abinitio* to chattel, and thus deprive plaintiff-appellant of his rights and benefits under Article I, Section 14 of the Constitution of the State of New York.

2. Assuming plaintiff-appellant can demonstrate a deprivation of a right under the Constitution of the State of New York, would this also constitute a violation of the due process clause of the Fourteenth Amendment of the United States Constitution?

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this appeal are as follows: (a) the plaintiff-appellant is an individual; (b) the defendant-respondent was at all times relevant a domestic corporation chartered by the State of New York. As to the corporate defendant, there are no parent companies or subsidiaries to list.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment entered in the Supreme Court Queens County on May 4, 2001 as was modified and affirmed by the Appellate Division Second Department by memorandum opinion as published at 302 AD2nd 496, 755 N.Y.S.2nd 282 (Second Dept 2003) (copy of judgement reproduced at 1A).

OPINIONS BELOW

The decision after a bench trial is unreported and is reproduced in the appendix herein at 10A-16A.

The memorandum opinion/order modifying and affirming the judgment by the Appellate Division Second Department is published at 302 AD2nd 496 755 N.Y.S.2nd 282 (Second Department 2003) reproduced at 1A to 3A. The order of the New York Court of Appeals denying leave dated November 20, 2003 is an unpublished, order reproduced at 6A.

JURISDICTION

This is a petition for a writ of certiorari from the memorandum opinion/order of the Appellate Division Second Department entered in that Court on February 18, 2003 which modified and affirmed the bench trial judgment entered in the office of the County Clerk of Queens County on May 4, 2001. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

The right that petitioner contends that he was deprived of in the state courts was the right to have been allowed recovery under the tort of trespass to personal property the facts

of which were clearly admitted at trial by the defendant as will be shown in the record and which tort is a recognized cause of action under common law and therefore is protected as such under Article I, Section 14 of the Constitution of the State of New York.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the State of New York, Article 1, Section 14 § 14. [Common law and acts of the state legislature]

> Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

Amendment XIV, Section 1 [1868] of the United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Although this case involved petitioner's claim for adverse possession and the interpretation of RPL 531 in a declaratory judgment action as it applied to petitioner who holds his apartment with the protection of Rent Control, the issue now addressed to this Court involves the cause of action for trespass into the apartment of petitioner caused by the defendant where it is undisputed that personal property of the petitioner was destroyed.

Suit was brought in the Supreme Court of the State of New York which was tried at a bench trial. Against the undisputed testimony and evidence in the record the Trial Court found insufficient evidence of trespass.

The undisputed facts clearly demonstrate that on the

22nd day of April 1996 a person or persons came into the apartment with the knowledge and consent and authority of the agents of the defendant and did therein do damage to petitioner's personal property.

Petitioner's counsel on cross examination reading from the EBT of defendant's president asked the witness at record 162 the following question and the witness did make the following answer:

> Q QUESTION: Did you have any workmen go into the apartment on your behalf? ANSWER: I had a guy who was repairing the bathroom in the second floor apartment, and that's a common ceiling between Mr. Katz' bathroom and the-- actually, Mr. Katz' bathroom ceiling is the floor for the second floor bathroom, and he had to break the floor on the second floor because Mr. Katz wouldn't allow access to fix a badly leaking pipe, a badly leaking sewer pipe that was between that floor and ceiling over there, and maybe, as a result of that, items fell down to Mr. Katz' apartment or something like that. The ceiling of the bathroom, the lamp maybe fell off, or something obviously because he didn't let anybody in. We had to do the work through the second floor which is not the common way to do work like that; we had to. That's the only thing that was done, and nobody was ever in his apartment;" is that correct, is that your answer?
>
> A Yes, that was my answer.

Earlier petitioner on direct examination gave the following uncontradicted testimony as to the above incident that occurred on April 22, 1996 as to the lamp referred to above relative to April 22, 1996 at record 82.

> Q And with respect to this electrician did you employ him to perform any services?
>
> A Yes.
>
> Q What, if anything, did he do?
>
> A He put up a new fixture with three bulbs over the sink.

That this trespass occurred on April 22, 1996 and that the trespasser cut off the apartment electricity thus necessitating the electrician that very night is documented by petitioner's letter to defendant's counsel at record 278 which reads:

ROBERT A. KATZ
Attorney at Law
201-03 Northern Boulevard
Bayside, New York 11361
(718) 428-0676

April 23, 1996

via Fax (212) 869-5772

David M. Kaminsky, Esq.
Kaminsky and Demoyano, P.C.
1500 Broadway, Suite 1803
New York, NY 10036

Re: Katz/Abler
137-82 70th Avenue, Flushing, New York 11367

Dear Mr. Kaminsky:

Sometime prior to 7:20 p.m. on Monday, April 22, 1996, I have good cause to believe your client, by its agents and servants, did force the locks and enter my apartment, upon which I have asserted adverse possession, without any notice to me and without my knowledge and consent.

I am taking pictures of the damage they did to my clothing and furniture, including cutting off my electricity.

I also inform you that the police were called and the incident is therefore duly recorded.

Once I have gathered all my evidence, I will consider filing a complaint with the District Attorney of Queens County and after consulting with my attorney, I will consider what civil remedies I will pursue, including breech of privacy.

Very truly yours,

Robert A. Katz

P.S. Specifications of damages to follow.

cc: Robert Lebron, Esq.

Finally, as to defendant's conduct the defendant by its president, the witness Kort testified on direct examination at record 127-28 as follows:

> Q Mr. Kort, what do you know about the entry into Mr. Katz' apartment that he described during his testimony?
>
> A At the time, there was a problem with the second floor bathroom. The second floor bathroom is directly above the first floor bathroom, meaning they are sharing the ceiling, the first floor bathroom, is the floor for the second floor bathroom. There is a pipe running in the ceiling, sewer pipe, that was clog, and according to the plumber, he said that we need to enter Mr. Katz' apartment to fix that pipe. I told him that this is impossible because Mr.

Katz would not-- would never allowed me to go into his apartment. He said okay, but what I can do for you is break the floor on the second floor and do the work through the floor. We have no other choice. The guy don't want to let us in. I said okay do it. We have to use to bathroom upstairs. He did it, he broke the floor. Obviously he broke the floor, Mr. Katz ceiling fell down into his bathtub, and that's I guess make him thin, we went into is apartment which we never did.

THE COMPLAINT

The third cause of action is the plaintiff's complaint alleged:

AS AND FOR A THIRD CAUSE OF ACTION

TWENTY-FOURTH: Plaintiff repeats each and every allegation of paragraph "FIRST" through "TWENTY-THIRD" as if fully set forth herein.

TWENTY-FIFTH: That on the 22nd day of April, 1996, the Defendant by its agents, servants or employees, against the consent and over the objection of the Plaintiff broke the lock of the Plaintiff's door and came into the apartment wherein defendant by its agents, servants and employees, destroyed the bathroom of the plaintiff and did damage to the clothes, furnishings and caused the Plaintiff to expend monies for an electrician.

TWENTY-SIXTH: That the conduct of Defendant amounted to a wilful trespass, all to the damage of the Plaintiff in the compensatory and punitive sum of $50,000.00 with interest from April 22, 1996.

(at record 16-17)

Independent of the pleading aforedescribed Plaintiff under New York law exercised the right at the end of trial to conform the complaint with the proof and that motion was granted at record 131.

> ...at this time, your Honor, I respectfully move to conform the pleadings to the proof. THE COURT: That application is granted.

REASONS FOR GRANTING THE WRIT

1. BECAUSE IT IS UNDISPUTED THAT THE TRIAL RECORD ESTABLISHES A TRESPASS AT LAW WHICH WAS IGNORED BY THE STATE COURT AT TRIAL AND APPEAL

The evidence as reflected in the record clearly demonstrates all the factors of New York law which prove there was clearly an admitted trespass which is a strict liability tort. Even assuming that there was an initial authorized entry, New York law has always recognized that such entry would become unlawful from the time of entry when damage and

injury are visited upon the personal property of the plaintiff. See *Ruddy v. Citibank* NA 224 AD2nd 509, 637 N.Y.S.2nd 793 (2nd Dept. 1996).

2. BECAUSE PETITIONER CONTENDS THAT THE STATE COURT BOTH AT TRIAL AND APPEAL WRONGFULLY DEPRIVED HIM OF RECOVERY ON THE COMMON LAW CAUSE OF ACTION OF TRESPASS TO PERSONAL PROPERTY WHICH CAUSE OF ACTION IS A PART OF THE LAW OF THE STATE OF NEW YORK SINCE IT WAS A RECOGNIZED CAUSE OF ACTION ON APRIL 19, 1775.

Under Article 1, sec. 14 of the New York State Constitution, any common law cause of action that was recognized as part of the law of colonial New York became part of the law of the State of New York on April 19, 1775. It can not be disputed that such occurred with trespass and that included trespass to personal property as a strict liability no fault tort.

In *Northern Pacific Railroad Co. v. Lewis* 162 U.S. 366 (1995) this Court recognized the nature of trespass to personalty and labeled same as *trespass de bonis asportatis*. The source of the court's statement rested on citing New York cases.

That this tort is part of the common law of New York is shown by *Reilly v. Merritt* 12 Misc. 2nd 111, 33 N.Y.S. 58 Court of Common Pleas (1895) wherein a landlord let plumbers

into the tenant's premises and the Court found trespass on the fact that the plumbers moved belongings of the tenant while they were upon the tenant's premises.

There can be no question that under the common law of England damage to personal property was an actionable trespass. Thus this tort was described in 7 Holdsworth History of English Law pg 414 in the following illustrative terms:

> Suppose that A enters B's rooms and breaks his chairs. His act is trespass...

3. BECAUSE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SHOULD ASSURE THAT THE STATE OF NEW YORK SHALL ADHERE TO ITS LAW AND CONSTITUTION

Petitioner's argument* herein is that on a record that clearly demonstrates and proves the trespass (at the very minimum as to the broken lamp) the State of New York dismisses the complaint on the trespass. Petitioner therefore claims that if that trespass was proven in the record petitioner had to recover even if nominal damages. *Burton v. Wilmington Banking Authority* 365 U.S. 715 (1961) wherein this Court speaking of the Fourteenth Amendment told the states that:

> ...no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be...

It is your petitioner's contention that the judges of the Courts of the State of New York at both the trial and appellate level did so abdicate.

If given the opportunity to appeal the petitioner will claim that consistent with such cases as *Cooper v. Aaron* 358 U.S. 1 (1958); *U.S. v. Raines* 362 U.S. 17 (1960); this Court should look at whether due process is being accorded in the Courts of the State of New York or whether the rubric of -- remaining contentions are without merit -- in the New York Courts signifies an indifference to accord effective appellate review. At bar, if this Court grants this petition and reviews the record and briefs below, the Court will find that the issues relating to trespass were preserved for review at all stages of the proceeding yet review amounted to "no issue of merit."

The cases I have referred to in this ground saw this Court address political/racial issues where this Court stepped in to vindicate due process critical of the state judicial machinery. At bar there is no such front page issue but that should not deter this Court from examination within the context of these precedents on the issue of whether the issue of deprivation of due process of law should be examined at bar.

Petitioner having practiced law in the Courts of the State of New York in excess of 40 years observes to the Court that the rubber stamp of no merit without addressing the issue has become prevalent as a matter of routine indifference in the intermediate appellate forums of the State of New York. Petitioner stands ready to demonstrate this observation of the Court finds same of interest. Further, since the New York

Court of Appeals has become one of appointed judges as contrasted to elect judges, the clear perception is that is almost insurmountable difficulty in gaining access to the New York Court of Appeals for the average litigant.

CONCLUSION

This court should find that it should allow review on the merits as to petitioner's claim of deprivation as a violation of due process of law and therefore the writ of certiorari should be granted.

Dated

New York, New York

Respectfully submitted

_____

Robert A. Katz
A member of the bar of this
Court appearing pro se

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

3010f
T/cf

_____AD2d_____ Argued - January 17, 2003

ANITA R. FLORIO, J.P.
WILLIAM D. FRIEDMANN
BARRY A. COZIER
WILLIAM F. MASTRO, JJ.

2001-05570

Robert Katz, appellant, v
Max Management Corp., respondent.

(Index No. 27782/96)

Robert Katz, Bayside, N.Y., appellant pro se.

David A. Kaminsky, P.C., New York, N.Y., for respondent.

In an action, inter alia, for a judgment declaring that the plaintiff has acquired title to the subject premises by adverse possession, the plaintiff appeals, as limited by his brief, from so as, after a nonjury trial, dismissed the complaint in its entirety.

ORDERED that the judgment is modified by adding a provision thereto declaring that the plaintiff has not acquired title to the subject apartment by adverse possession; as so modified, the judgment is affirmed insofar as appealed from, with costs.

It is well settled that a party seeking to obtain title to real property by adverse possession not based upon a written instrument must demonstrate, by clear and convincing evidence, that the possession of the property was (1) hostile under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (*see* RPAPL 521, 522; *see also Brand v. Prince,* 35 NY2d 634; *Gerlach v. Russo Realty Corp.*, 264 AD2d 756; *MAG Assocs. v. SDR Realty,* 247 AD2d 516). The Supreme Court correctly found that the plaintiff failed to meet these requirements or to establish them by a fair preponderance of the credible evidence. The plaintiff's actions from the time he became a tenant until he commenced this action were consistent with those of a tenant and not those of a person making a claim to ownership by virtue of adverse possession.

It is further noted that the plaintiff's reliance on RPAPL 531 is misplaced. That statute states that when a tenancy is terminated, a claim for adverse possession can begin to accrue. Here, the tenancy never terminated; the plaintiff even stated at trial that he is still a rent-controlled tenant. In addition, the plaintiff acquiesced to the ownership of the premises by the landlord by failing to oppose the landlord's right to collect increased rent, as a result of having provided essential services, and therefore, the required element of hostility under claim of right was not demonstrated (*see MAG Assocs. v. SDR Realty, supra*).

The plaintiff's remaining contentions are without merit.

We note that since this is, in part, a declaratory judgment action, the Supreme Court should have made a declaration in favor of the respondents rather than dismissal of the complaint (*see Lanza v. Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

FLORIO, J.P., FRIEDMANN, COZIER and MASTRO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

0337P
A/sl

ANITA R. FLORIO, J.P.
WILLIAM D. FRIEDMANN
BARRY A. COZIER
WILLIAM F. MASTRO, JJ.

2001-05570

DECISION & ORDER
ON MOTION

Robert A. Katz, appellant,
v Max Management Corp., respondent.

(Index No. 27782/96)

Motion by the appellant pro se for leave to reargue an appeal from a judgment of the Supreme Court, Queens County, dated April 16, 2001, which was determined by decision and order of this court dated February 18, 2003, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court, and cross application by the respondent, inter alia, to impose a sanction on the appellant.

Upon the papers filed in support of the motion and the

papers filed in opposition thereto, it is

ORDERED that the notion is denied, with $100 costs; and it is further,

ORDERED that the cross application is denied.

FLORIO, J.P. FRIEDMANN, COZIER and MASTRO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November 2003

PRESENT, HON. JUDITH S. KAY, *Chief Judge, presiding*

2-14 Mo. No. 1002
Robert Katz,
Appellant,
v.
Max Management Corp.,
Respondent.

A motion for leave to appeal to the court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/
Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART J.H.O

----------X

ROBERT A. KATZ,

Plaintiff,

Index No.
027782/96

JUDGMENT

-against-

MAX MANAGEMENT CORP.,

Defendant.

----------X

A trial having been conducted and testimony given in this matter on October 11, 2000 and October 12, 2000 before Judicial Hearing Officer Allen Beldock, and upon the testimony taken thereat and upon the Post-Trial Memorandum of Law submitted to the Court by the defendant on or about November 27, 2000; and

NOW UPON the Memorandum Decision of Judicial Hearing Officer Allen Beldock dated February 1, 2001, and upon the motion by Defendant MAX MANAGEMENT CORP.,

IT IS HEREBY ADJUDGED that the First, Second and Third Causes of Action of the plaintiff's Complaint herein be dismissed;

IT IS HEREBY ADJUDGED that the First and Second Affirmative Defenses contained in the Answer of the defendant be dismissed in their entirety;

IT IS HEREBY ADJUDGED that the Third, Fourth,

Fifth and Sixth Affirmative Defenses contained in the Answer of the defendant as to plaintiff's First Cause of Action be sustained;

IT IS HEREBY ADJUDGED that the Third, Fourth, Fifth and Sixth Affirmative Defenses contained in the defendant's Answer as to plaintiff's Second Cause of Action be sustained;

IT IS HEREBY ADJUDGED that the Third and Fourth Affirmative defenses contained in the defendant's Answer as to plaintiff's Third Cause of Action be sustained;

IT IS HEREBY ADJUDGED that the Second, Third and Fourth Counterclaims contained in the defendant's Answer be dismissed;

IT IS HEREBY ADJUDGED that the First Counterclaim contained in the defendant's Answer be sustained in favor of the Defendant, MAX MANAGEMENT CORP., located at 240 East 39th Street, #8B, New York, New York 10016 and said defendant shall recover of Plaintiff ROBERT A. KATZ residing at 137-82 70th Avenue, County of Queens, City and State of New York, the sum $8,000.00 (EIGHT THOUSAND DOLLARS) plus interest from Jan 1, 2001 in the sum of $240.66 without costs and disbursements for a total of $8,240.66 and the Defendant, MAX MANAGEMENT CORP. shall have execution therefore; and

IT IS HEREBY ADJUDGED that the Notice of Pendency/Lis Pendens that was filed with the Clerk's Office in Queens County by the plaintiff on or about January 30, 1997, be vacated and canceled and that the recording of a duly

executed copy of the within Judgment shall be deemed sufficient to vacate and cancel same against the defendant's property;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above represents the decision and judgment of this Court.

Dated: New York, New York
April 16, 2001

ENTER:

S/
J.H.O Allen Beldock

S/
Gloria D'Amico

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART J.H.O

----------X

ROBERT A. KATZ,

Plaintiff,

-against-

MAX MANAGEMENT CORP.,

Defendant.

----------X

Index No.
027782/96

MEMORANDUM
DECISION

ALLEN BELDOCK, JUDICIAL HEARING OFFICER:

The complaint in this action contains three (3) causes of action. The first cause of action seeks a declaratory judgment declaring that plaintiff should have title, ownership, and possession of an apartment occupied by him and one half (½) of the common area of the building premises in the nature of the partition. The second cause of action seeks "a permanent injunction barring the occupancy of the basement apartment" of the subject premises, 137-82 70th Avenue, Flushing, Queens County, New York City, New York, which premises appear to be a 2-family dwelling with a basement and two (2) upper levels wherein the plaintiff occupies the lower level. The third cause of action seeks a money judgment of fifty thousand ($50,000.00) dollars alleging a "wilful act of trespass" and property damage. The answer of the defendant is in effect a general denial with twelve (12) affirmative defenses and four(4) counterclaims. The first counterclaim seeks a judgment in the amount of $29,120.00 with interest from January 1, 1980

alleging that amount due the defendant from the plaintiff for "rent and rent arrears". The second counterclaim seeks a judgment in the amount of $15,000.00 for counsel fees for services rendered in defending this case. The third counterclaims seeks a judgment in the amount of $25,000.00 to cover the alleged cost of repairs required to be made to a water pipe located between plaintiffs apartment and the apartment above and other alleged repairs. The fourth counterclaim seeks a judgment in the sum of $100,000.00 for alleged damages due to plaintiff's alleged intimidation and harassment.

On April 11, 2000 by written and signed stipulation, the parties agreed that this matter be referred to the undersigned judicial hearing officer to hear and determine all issues. Therefore, the case was tried before me on October 11th and 12th 2000. The only persons to testify at the trial were the plaintiff on his own behalf and one Amit Kort, a principal of the defendant corporation.

This decision constitutes my Findings of Fact and Conclusions of Law following said trial.

In support of the first cause of action plaintiff relies upon Section 531 of the Real Property And Procedure Law, which reads as follows:

"Adverse Possession, How Affected By Relation Of Landlord And Tenant: Where the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration of ten years after the last payment of rent, notwithstanding that the

tenant has acquired another title or has claimed to hold adversely to his landlord, but this presentation shall cease after the periods prescribed in this section and such tenant may then commence to hold adversely to his landlord."

At the trial the plaintiff testified as follows:

That as a tenant he stopped paying rent in 1976; that he was a rent-controlled tenant since 1980; that he filed an application for reduction of rent in or around 1979 some three years after he claimed he stopped paying rent), that in 1997 he answered the landlord's request to the State of New York Division of Housing And Community Renewal (DHCR) to restore the rent in his capacity as tenant of the subject apartment; that he did not pay any taxes for the building; that he did not make any repairs to the building; that in or about 1995 when he saw a "for sale" sign on the building he did nothing to interfere with the transfer of the property.

Amit Kort testified on behalf of the defendant that the defendant purchased the subject property in December 1995 and that the plaintiff has not paid the controlled rent or any rent or use and occupancy charges since the defendant purchased the property. He further testified that he sought to exercise his obligation as a principal of the landlord's corporation by attempting to enter plaintiff's apartment to repair damage in said apartment which damage was done on or about April 22, 1996.

In order for a claim of title of Real Property to be acquired under a claim of adverse possession, such possession for a period of ten years must have been (1) hostile and under a claim of right (2) actual (3) open and notorious (4) exclusive.

I find that the plaintiff has failed to meet these requirements and/or to establish them by a fair preponderance of the credible evidence. On the contrary and based upon the evidence in this case, both testimonial and documentary, I find that the actions of the plaintiff from the time he became the tenant in the subject apartment up to and including the time of the commencement of this action, to have been consistent with those of a tenant and not those of a person making a claim to ownership by virtue of adverse possession. Particularly is this position established by defendants exhibit "A" in evidence which is a letter dated January 2, 1996 from the plaintiff writes "I am the rent controlled tenant residing in the lower apartment" of 137-82 70th Avenue, Flushing, New York 11367. I find, therefore, that the plaintiff himself as recently as January 2, 1996 still considered himself a tenant of the subject premises and not the owner thereof. I further find that the facts of this case constituting the testimonial and documentary evidence as stated above fail to establish title to the subject premises in the plaintiff by adverse possession as provided in Section 531 of the Real Property Actions and Procedure Law in spite of the fact that ten (10) years or more had expired since the last payment of rent by the plaintiff. All of the other requirements to obtain title by adverse possession have not been established as required by law and as stated above. Therefore, the first cause of action of the complaint is dismissed.

In the second cause of action the plaintiff seeks "a permanent injunction barring the occupancy of the basement apartment" alleging that "the defendant has constructed and rents out an illegal basement apartment" and "that such occupancy causes fire hazard." I find that the plaintiff has failed to prove such allegations or any of them by a fair preponderance of credible evidence and therefore this second

cause of action alleged in the complaint is dismissed and the application for an injunction of any kind is denied.

The third cause of action seeks money damages alleging a trespass and destruction of property of the plaintiff by the defendant. I find that the plaintiff has failed to prove the allegations of this cause of action or any part thereof by a fair preponderance of credible evidence. There was no credible proof as to who, if anyone, entered the apartment and who or what caused the damage alleged nor was there any evidence of the extent of the alleged damage in terms of the cost to repair said damage. Therefore, the third cause of action is dismisses.

The Affirmative Defenses set forth in the answer of the defendant are disposed of as follows:

The first and second are dismissed.

The third, fourth, fifth and sixth to plaintiff's first cause of action are sustained as set forth above in this decision denying the plaintiff's claim of title to the subject property by the doctrine of adverse possession.

The third, fourth, fifth and sixth to plaintiff's second cause of action are sustained as set forth in this decision in denying the plaintiff's application for an injunction.

The third and fourth to plaintiff's third cause of action are sustained as set forth above in this decision in dismissing said third cause of action.

The second, third, and fourth counterclaims are dismissed since I find that the defendant has failed to sustain

the allegations in them by a fair preponderance of credible evidence-testimonial or documentary and/or expert or otherwise. There was no evidence submitted on the issues of damages as alleged in said counterclaims.

With regard to the first counterclaim in which the defendant seeks a judgment in the sum of $29,120.00 for alleged rent due and unpaid, the witness for the defendant, Amit Kort, testified that the total amount of rent due from the plaintiff is $13,760.00 including the amount of rent assigned to the defendant from the previous owner of the subject property. However, the defendant failed to prove to my satisfaction by a fair preponderance of the credible evidence the amount of rent assigned. The witness, Amit Kort, did testify however, that $8,000.00 of the aforementioned $13,760.00 is due as follows:

For the year 1996	$ 960.00
For the year 1997	$ 1,600.00
For the year 1998	$ 1,920.00
For the year 1999	$ 1,920.00
For the year 2000	$ 1,600.00
Total	$ 8,000.00

I find the testimony of the said witness, Amit Kort, to be credible and to be sufficient to establish by a fair preponderance of the credible evidence that the plaintiff is indebted to the defendant for rent of the subject apartment in the sum of $8,000.00 and judgment is awarded to the defendant and against the plaintiff in the sum of eight thousand ($8,000.00) dollars with interest to be computed.

Settle judgment on notice.

Dated: Jamaica, New York
February 1, 2001

S/
ALLEN BELDOCK
Judicial Hearing Officer